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**Caterpillar Inc. and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC. Case 30-CA-064314**

October 30, 2014

**DECISION AND ORDER**

BY MEMBERS MISCIMARRA, JOHNSON, AND SCHIFFER

On April 23, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 97 (2013). Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket to take further action as appropriate.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein, as modified.<sup>2</sup> Accordingly, we affirm the

<sup>1</sup> Accordingly, the Respondent's pending motion for reconsideration of the prior Decision and Order is mooted.

<sup>2</sup> In finding that the Respondent violated Sec. 8(a)(5) and (1) by refusing access to a nonemployee union representative to investigate after a fatal accident, we find no need to rely on the Respondent's lax approach to the admission of documents at the hearing, evidence as to predecessor employer Bucyrus' history of allowing visitors access to the plant, or Regional Manager Rod Bolhous' "concession" that the risk of disclosing confidential information by allowing access has not changed since Caterpillar's acquisition. We find it sufficient that the record shows that Caterpillar itself frequently gives tours to customers, dealers, and technical groups, and has also given tours to students. Tour groups go through during work hours while work is in progress, and Bolhous testified that it would be a "normal part of the visit" for customers to tour the area where the accident occurred. There is no evidence that the Respondent ever required any of these visitors to sign nondisclosure agreements. In these circumstances, we find that the Respondent has failed to meet its burden of establishing a confidentiality interest that would outweigh the Union's right to conduct a reasonably limited health and safety inspection.

Our colleague concurs in finding the violation, but dissents from modifying the judge's remedial Order. In essence, he disagrees with the conclusion, incorporated here, that the "Respondent failed to

judge's rulings, findings, and conclusions and adopt the judge's recommended Order, as also modified here, to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 97, which is incorporated herein by reference, as modified.<sup>3</sup>

Dated, Washington, D.C. October 30, 2014

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Harry I. Johnson, III, Member

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Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

I would affirm the judge's rulings, findings, and conclusions in this case, which involves the Respondent's failure to grant access to a nonemployee union representative for purposes of conducting a health and safety inspection after a fatal accident. I believe the judge properly applied the Board's decision in *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), enf'd. 778 F.2d 49 (1st Cir. 1985), and the record provides substantial support for finding that the Union's representational interest in the circumstances presented here warranted the granting of access as provided in the judge's recommended Order (discussed below), notwithstanding the Respondent's right to control its property and ensure its operations are unhindered. See, e.g., *C.C.E., Inc.*, 318 NLRB 977 (1995).

I dissent, however, from my colleagues' failure to adopt the judge's recommended Order, which, instead of requiring immediate access, would have required the Respondent, upon request, to engage in good-faith bargaining with the Union regarding reasonable measures to permit access while protecting Respondent's interest in

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demonstrate a confidentiality interest that would warrant conditioning access upon execution of a confidentiality agreement." 359 NLRB No. 97, slip op. at 1. *C.C.E., Inc.*, 318 NLRB 977 (1995), cited by our colleague, is distinguishable. There, the Board, addressing an asserted confidentiality interest, adopted the judge's remedy allowing access "for reasonable periods and at reasonable working or production times" (similar to the scope restrictions that we have imposed here), but allowed the employer to "protect its interest as it has with other visitors by covering such 'secret' portions of its product or production." Id. at 981. Here, there is no evidence that the Respondent has ever taken similar measures with visitors to protect its asserted confidentiality interest (by covering secret things or by other means); indeed, as noted above, the record shows otherwise.

<sup>3</sup> We shall substitute a new notice to conform with *Durham School Services*, 360 NLRB No. 85 (2014).

preserving the confidential nature of its manufacturing processes. My colleagues discount the need for such bargaining based on evidence that the Respondent has permitted access to the facility by certain other nonemployee visitors in the past. The judge found that this evidence caused the Respondent's property interest to be "lessened to a degree," but he made this finding when addressing whether any access was warranted under *Holyoke Water Power*, supra. At the same time, the judge also found that the Respondent possesses bona fide confidentiality concerns. In addition, the judge found that Respondent and the Union had negotiated "similar agreements" in the past regarding workplace protocols, other documents, and a DVD that showed some of Respondent's operations. Accordingly, I believe the record warrants the remedial order fashioned by the judge, which provided for good-faith bargaining, upon request, regarding reasonable measures to protect Respondent's interest in preserving the confidentiality of its manufacturing processes.

Dated, Washington, D.C. October 30, 2014

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Philip A. Miscimarra,

Member

NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC, by denying the Union's request for access to our South Milwaukee facility to investigate an industrial accident and to conduct a health and safety inspection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, upon the Union's request, grant access, by the Union's Health and Safety Specialist, to reasonable places within the South Milwaukee, Wisconsin facility, for a reasonable period and at a reasonable time, to investigate an industrial accident and to conduct a health and safety inspection, including investigating all of the processes used to turn crawler assemblies.

CATERPILLAR INC.

The Board's decision can be found at [www.nlrb.gov/case/30-CA-064314](http://www.nlrb.gov/case/30-CA-064314) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

